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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 34/2018 concerning Salah Hammouri (Israel)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed that mandate and most recently extended it for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 5 January 2018 the Working Group transmitted to the Government of Israel a communication concerning Salah Hammouri. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. Hammouri is a French national of Palestinian origin who is currently detained in Israel under an administrative detention order. He is married and has a young son, and his wife and son live in France. Mr. Hammouri usually resides in the neighbourhood of Kafr 'Aqab in Jerusalem and is reportedly a human rights defender.

Arrest and administrative detention

5. On 23 August 2017, according to the source, Mr. Hammouri was reportedly arrested by Israeli occupation forces in a pre-dawn raid from his home in Kafr 'Aqab. He was subsequently taken to the Al-Maskobyeh (Russian compound) interrogation centre.

6. The source reports that, Mr. Hammouri has been placed in administrative detention. He was arrested on the basis of a secret file and was neither presented with any charges nor tried. The Israeli officials reportedly stated that Mr. Hammouri's activities in Jerusalem had escalated. However, they did not specify or provide any details regarding those activities or the actual reasons behind his arrest.

7. On 29 August 2017, Mr. Hammouri reportedly received a six-month detention order, which was set to end on 22 February 2018. On 26 February 2018, his detention order was further extended until 30 June 2018. Mr. Hammouri is still held at Naqab prison.

8. According to the source, Mr. Hammouri has encountered severe difficulties in gaining access to legal assistance. He was reportedly given an initial session with legal counsel on the first day of his arrest. However, in his detention since then, he has struggled to consult a lawyer of his choosing as the authorities have reportedly made it very difficult for him to have legal representation, and have only allowed one lawyer to visit him. In addition, during that visit, the Israeli authorities did not allow the French consulate representative to see Mr. Hammouri.

9. The source reports that Mr. Hammouri's family was not allowed to visit him until 18 October 2017, almost two months after his arrest. Since that time, his family has been allowed to visit only once per month for 45 minutes in very restrictive conditions. During those visits, Mr. Hammouri and his family members are separated by a glass barrier and allowed to communicate only through a telephone. In addition, the visitation rooms are crowded (with more than 10 detainees in one room), and the telephones are monitored, giving the detainees no privacy.

10. According to the source, Mr. Hammouri's lawyers have demanded that the administrative detention order be removed since it did not have any legal basis. They have also demanded a conditional release instead of administrative detention. After their appeal against the extension of Mr. Hammouri's detention was rejected, they submitted an appeal to the Israeli High Court against the administrative detention of Mr. Hammouri, which was also rejected.

Ill-treatment

11. The source reports that Mr. Hammouri was allegedly interrogated in inhumane conditions and placed in an isolated room lacking the minimum needs for humane living. According to the source, isolation is a tactic used by the Israeli occupation forces to deny the detainee contact with the outside world.

12. The source alleges that the authorities have attempted to pressure Mr. Hammouri to confess to charges he did not commit by continuously extending his initial detention period. However, he has refused to confess and has thus been given an administrative detention order without any charge or trial.

13. The source reports that Mr. Hammouri has been subjected to the so-called "Bosta" transfers (i.e., between prisons and courts in military vehicles). He is transferred to court one day before his hearing then spends one night at Ramleh prison in inhumane detention conditions. He is subsequently transferred to court the following day and back to Ramleh

prison after the hearing, where he spends another night, before being transferred back to Naqab prison (i.e. a total of three days are spent in transfer). Furthermore, if his hearing is scheduled to take place on a Sunday or a Thursday (as was the case for his most recent two hearings), he spends a total of five days in transfer because of the weekend, including three nights at Ramleh prison instead of one.

14. The source asserts that Mr. Hammouri's administrative detention amounts to psychological torture for him and his family. A detainee serves his first administrative detention order not knowing if he will be released or not. Reportedly, in most cases, administrative detention orders are renewed up to three times and sometimes more. The source underlines that this is an emotional suffering for the detainee and his family members.

Conditions of detention

15. According to the source, Mr. Hammouri was transferred to Naqab prison after 20 days of arrest. He continues to be held in that prison, which is located in the desert. Prisoners in that area reportedly suffer from extreme weather conditions, including extreme heat in the summer and severe cold during the winter. Detainees have nothing to help them cool down or keep warm and only have bed covers if their families provide it.

16. The source reports that Naqab prison is geographically very far from Mr. Hammouri's parents, who live in Jerusalem. It takes them approximately three hours to get to the prison to visit their son.

17. The source also reports that Mr. Hammouri has not had any contact with his wife, since she is banned from entering the country. She can therefore not visit him or attend court hearings and can only contact Mr. Hammouri's lawyer or her in-laws for information. This has had a huge impact on Mr. Hammouri, his wife and their young son, who keeps asking to talk to his father. The source notes that the arrest of Mr. Hammouri, the ban on his wife from entering the country and her inability to visit him, and the uncertainty of his release have made the situation especially hard on the family as a whole.

18. The prisoners at Naqab prison reportedly also suffer from bad food quality and ill-treatment. The prison administration only offers them food of a very bad quality, thereby forcing them to buy food supplies and make their own meals. In addition, prisoners are not provided with any clothes or covers, forcing families to buy these essentials. The families of the prisoners reportedly bring clothes, bed covers, shoes (one pair only) and other basics, and the prisoners buy food, cleaning products and shower products.

19. According to the source, Mr. Hammouri has not been allowed to complete his Master's degree in prison, as higher education has been banned inside the prisons. In addition, Mr. Hammouri's job and engagement as a human rights defender were halted owing to his arrest.

20. According to the source, the Government of Israel has not given any official statements in the present case. However, they reportedly responded to a statement by the French Foreign Ministry, saying that Mr. Hammouri was affiliated with an illegal organization.

Response from the Government

21. On 5 January 2018, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 6 March 2018, detailed information about the current situation of Mr. Hammouri and any comments on the source's allegations.

22. The Working Group regrets that it did not receive a response from the Govern nent, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

23. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

24. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

25. The Working Group observes that Mr. Hammouri was arrested on 23 August 2017 following a raid on his home by the Israeli forces. It has been submitted that he was not presented with an arrest warrant, and the reasons for his arrest were not explained to him at the time of the arrest or immediately afterwards. The Working Group notes that the Government had an opportunity to rebut these allegations but has chosen not to do so. The Working Group therefore concludes that there has been a prima facia breach of article 9 (2) of the Covenant.

26. Moreover, it has been submitted that Mr. Hammouri was then subjected to administrative detention on the basis of Military Order No. 1651 (2009), article 31 (detention for interrogation), and was placed in administrative detention without charge or trial on 29 August 2017. Once again, the Working Group notes that the Government had an opportunity to rebut these allegations but has chosen not to do so.

27. The Working Group has already stated its agreement[1] with the views expressed by the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person that any administrative detention presents severe risks of arbitrary deprivation of liberty and would normally amount to arbitrary detention, as other effective measures addressing the threat, including the criminal justice system, would be available. Such administrative detention must therefore be most exceptional, and, as the Human Rights Committee has pointed out in paragraph 15 of that general comment:

> If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.

28. In the present case, the Working Group observes that Mr. Hammouri has been held in administrative detention since 29 August 2017. The Government has had an opportunity but has failed to inform the Working Group as to what present, direct and imperative threat Mr. Hammouri posed at the time of his arrest and how this threat has persisted during his detention for what is now some eight months. That is an imperative requirement to ensure compliance with article 9 of the Covenant and ensure the legality of such administrative detention. The Working Group must therefore conclude that this threat does not exist and the arrest and subsequent detention of Mr. Hammouri therefore lacks a legal basis, is contrary to article 9 of the Covenant and consequently is arbitrary, falling under category I.

29. Having established that the administrative detention of Mr. Hammouri was not imposed in the most exceptional circumstances and that no direct and imperative threat justifying such detention was present, the Working Group will now proceed to establish whether the other requirements of article 9 of the Covenant have been met.

30. As the Human Rights Committee also stated in paragraph 15 of its general comment No. 35, such administrative detention must not last longer than absolutely necessary, the overall length of possible detention must be limited, and the guarantees provided for in article 9 of the Covenant must be fully respected in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal

[1] See opinions No. 44/2017 and No. 86/2017.

advice, preferably chosen by the detainee, and disclosure to the detainee of, at least, the essence of the evidence upon which the decision to detain him or her has been taken.

31. In the present case, the Working Group observes that there has been no prompt or regular review of Mr. Hammouri's continued detention to ascertain whether the need to detain still persists. In fact, Mr. Hammouri was arrested on 23 August 2017 and is still to formally learn what charges against him have legitimized his detention for a period of some eight months. Moreover, no explanation as to the reasons for his detention nor access to any evidence that served as the basis for the issuance of the detention order have been provided to his lawyer.

32. The Working Group recalls that, under article 9 (2) of the Covenant, anyone who is arrested should not only be promptly informed of the reasons for his or her arrest, but also informed promptly of any charges against him or her. Mr. Hammouri has been denied that right. The Working Group further observes that full compliance with the requirements of article 9 (2) is essential to enable the detained person to exercise the right to challenge the legality of detention as envisaged in article 9 (4) of the Covenant.

33. The right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[2] That right, which is, in fact, a peremptory norm of international law, applies to all forms of deprivation of liberty,[3] and to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also situations of detention under administrative and other fields of law, including military detention, administrative detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[4] It also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[5]

34. In the present case, Mr. Hammouri's lawyer has been effectively prevented from challenging the legality of the continued administrative detention of his client as he has been denied access to any documents supporting the detention. This is a clear violation of article 9 (4) of the Covenant.

35. The Working Group further notes that, on 26 February 2018, the administrative detention order was extended further and that formal charges have still not been brought against Mr. Hammouri. The Working Group wishes to reiterate that, where an initial period of administrative detention runs out without formal charges being brought against the detainee and a further period of detention is demanded by the detaining authorities, the threshold of proof for requiring this further detention becomes much higher. The judicial forum before which such subsequent detention is sought is thus obligated under international human rights law to employ stricter rules of determination for arriving at a decision in this regard.[6] The Working Group observes that Israel has not met this threshold.

36. Moreover, the Working Group observes that Mr. Hammouri is a French national and it has been alleged that he was denied consular assistance during the initial days of his detention. The Working Group notes that the Government of Israel had the opportunity to rebut these allegations but has failed to do so.

37. The Working Group notes that consular assistance or consular protection constitutes an important safeguard for individuals who are arrested and detained in a foreign State to ensure that international standards are being complied with. It provides such detainees as well as consular officials of the same nationality as the detainee with certain consular

[2] See A/HRC/30/37, paras. 2–3.
[3] Ibid., para. 11.
[4] See Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, para. 47 (a).
[5] Ibid., para. 47 (b).
[6] See opinion No. 5/2010.

rights, which include the right to communicate freely with and have access to their detained nationals and to be informed about the arrest without delay. These rights are embodied in rule 62 (1) of the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principle 16 (2) of the Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment.

38. In the present case, the Government of France clearly asserted its rights of consular assistance in relation to Mr. Hammouri,[7] and the denial of such consular assistance therefore constitutes a further breach of international law by Israel.

39. The Working Group once again notes[8] the continuing long-term state of emergency existing in Israel. In that connection, it recalls the concluding observations of the Human Rights Committee on the fourth periodic report of Israel, in 2014, in which the Committee reiterated its concern at the ongoing state of emergency in Israel and reminded the Government that state-of-emergency measures must be of an exceptional and temporary nature and limited to the extent strictly required (see CCPR/C/ISR/CO/4, para. 10). The Committee also made the same recommendation to Israel during its previous reporting cycle, in 2010 (see CCPR/C/ISR/CO/3, para. 7).

40. In addition, the present case yet again raises the broader issue of the compatibility of administrative detention orders issued under Israeli Military Order No. 1651 with international human rights law. In that connection, the Working Group has already expressed[9] and again reiterates its agreement with the Human Rights Committee, which stated in its concluding observations in 2014 that it remained concerned at the continuing practice of administrative detention of Palestinians; at the fact that, in many cases, detention orders had been based on secret evidence; and at the denial of access to counsel, independent doctors and family contacts. The Committee recommended that Israel end the practice of administrative detention and the use of secret evidence in administrative detention proceedings, and ensure that individuals subject to administrative detention orders were either charged promptly with a criminal offence or released (see CCPR/C/ISR/CO/4, para. 10).

41. The Working Group notes that derogations under article 9 of the Covenant, which lead to deprivation of liberty and which are unreasonable or unnecessary, cannot be justified under article 4 of the Covenant. As the Human Rights Committee clearly stated in paragraph 65 of the above-mentioned general comment: "States parties derogating from normal procedures required under article 9 in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation."

42. The Working Group is of the view that the Government of Israel in the present case has failed to explain why the detention of Mr. Hammouri has been strictly required by the exigencies of the actual situation. He has been in detention for some eight months without knowing the reasons for his detention, which makes it impossible for him to challenge the legality of his continued detention. Furthermore, the Government has not provided any reasons that might justify his detention. The Working Group therefore concludes that the arrest and continued detention of Mr. Hammouri is arbitrary and falls under category III.

43. Finally, the Working Group notes the growing volume of its own jurisprudence concerning administrative detention of Palestinians in Israel and observes that the present case follows the same pattern. In the absence of any explanation from the Government, taking note of the pattern that has emerged through the number of cases that have been brought before it in the past with similar facts,[10] and noting the general manner in which the administrative detention orders in those cases were used against Palestinians in particular,

[7] See, for example, "Israël — Situation de Salah Hamouri" (25 October 2017), available at www.diplomatie.gouv.fr/fr/dossiers-pays/israel-territoires-palestiniens/relations-bilaterales/evenements/article/israel-situation-de-salah-hamouri-25-10-17.

[8] See opinions Nos. 44/2017 and 86/2017.

[9] See opinions No. 44/2017 and No. 86/2017.

[10] See opinions No. 13/2016, No. 24/2016, No. 3/2017, No. 44/2017 and No. 86/2017.

as highlighted by the Human Rights Committee (see CCPR/C/ISR/CO/4, para. 10), the Working Group concludes that the arrest and detention of Mr. Hammouri, who is a Palestinian, is arbitrary and also falls under category V.

44. Given the pattern of cases involving arrest and detention of Palestinians under administrative detention orders on the basis of their nationality that it has noted, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, for appropriate action.

45. The Working Group reiterates that it would welcome the opportunity to work constructively with the Government of Israel in addressing its serious concerns relating to arbitrary deprivation of liberty.[11] On 7 August 2017, the Working Group sent a request to the Government to undertake a country visit and hopes that it will receive a positive response from the Government as a sign of its willingness to enhance its cooperation with the United Nations special procedures.

Disposition

In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Salah Hammouri, being in contravention of articles 3, 8 and 9 of the Universal Declaration of Human Rights and of article 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

46. The Working Group requests the Government of Israel to take the steps necessary to remedy the situation of Mr. Hammouri without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

47. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Hammouri immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

48. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hammouri, and to take appropriate measures against those responsible for the violation of his rights.

49. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, for appropriate action.

Follow-up procedure

50. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Hammouri has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Hammouri;

(c) Whether an investigation has been conducted into the violation of Mr. Hammouri's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Israel with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

[11] See opinions No. 3/2017, No. 31/2017, No. 44/2017 and No. 86/2017.

51. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

52. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

53. The Government should disseminate through all available means the present opinion among all stakeholders.

54. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[12]

[*Adopted on 25 April 2018*]

[12] See Human Rights Council resolution 33/30, paras. 3 and 7.